CHAPTER 9

VALUE JUDGMENTS IN ARBITRATION: THEIR IMPACT ON THE PARTIES' ARGUMENTS AND ON THE ARBITRATORS' DECISIONS

I. THE INFLUENCE OF VALUES IN THE ARBITRAL DECISIONMAKING PROCESS

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When the late Ralph Seward asked for advice about speechmaking at an Academy meeting, he was told to make it simple and straightforward and to "be sure to put in a little uplift."[1] Being simple is a challenge for professors whose goal in life is to make the simple complex, but I will try to meet the challenge. Being straightforward is a congenital character defect of mine that, happily, has kept me from becoming a Dean. Being simple and straightforward, however, can give intended uplift to the appearance of destructive criticism—particularly when asking people to engage in the often painful, disturbing, and even shocking process of self-examination.

Because we are arbitrators, and we spend so much of our time trying to discover the sometimes nonexistent "intentions of the parties," we need to make our intentions clear and unambiguous. I want to draw your attention to a vastly neglected aspect of arbitral decisionmaking: the influence of the values of the deciders on the judgments they make. I will define "values" and explain why it is important for us as deciders to recognize their existence and their effect on the arbitral decisionmaking process. It will also be useful to consider why the subject of values has been neglected.

I see this discussion today and the limited research done in this area (including my own) as only the beginning of the research and

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[1]Seward, *Grievance Arbitration—The Old Frontier*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1970), 153, 154.

deliberation needed to understand this subject. It is particularly appropriate on the occasion of the Academy's 50th anniversary to discuss this neglected aspect of labor arbitration with a group founded in part "to promote the study and understanding of the arbitration of industrial disputes."[2] My ultimate intention is consistent with this organization's charge: to trigger a major long-term effort to deepen understanding of the arbitral decisionmaking process that so directly affects people's lives and careers.

Values and Their Use

Simply put, values, as used here, are personal or societal conceptions of the way things ought to be. They prescribe and proscribe. They are enduring (but not necessarily unchanging) beliefs that certain means or ends of action are desirable or undesirable. As one expert put it, "To say that a person has a value is to say that cognitively he [or she] knows the correct way to behave or the correct end-state to strive for."[3] There is, therefore, an "ought" or "should" character to values. Values are beliefs about what should or ought to happen or what should or ought to be permitted to happen. Certain values may be prejudiced or biased, but that is only one type of value. The consequences of human values are manifested in almost everything considered worth investigating and understanding in the disciplines of sociology, anthropology, psychology, political science, education, economics, religion, history, and law, as well as industrial and labor relations. Consequently, the study of values should occupy a central position in all our learning.

We as labor arbitrators, for example, use values to judge the conduct of others in disciplinary cases and to determine what constitutes just cause for discipline in those cases. The Academy has a Code of Professional Responsibility that sets standards of ethical behavior for its members. We commonly assert values in our opinions to persuade the parties of the justness and correctness of our decisions. Consciously or unconsciously, we use values when we choose among reasonable but different or conflicting alternatives in cases that could be decided in more than one way. Along the same lines, we use values to fill in the gaps in contract language or

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[2]National Academy of Arbitrators Constitution, art. II (1947) (amended April 29, 1975, and June 1, 1993). The current version of this language in the NAA Constitution reads: "to promote the study and understanding of the arbitration of labor-management and employment disputes."

[3]Rokeach, The Nature of Human Values (Free Press 1973), 7.

to give more certain meaning to unclear and ambiguous contract language. We also use values in determining appropriate remedies. There are, moreover, important values underlying the entire grievance arbitration system of conflict resolution.

The Academy's Prior Consideration of the Role of Values

This is not the first time the subject of values has been considered at an annual meeting of the Academy. In 1959, shortly after the Supreme Court's decision in the *Lincoln Mills*[4] case, Archibald Cox[5] told those attending the 12th Annual Meeting:

> We may have been bemused by the precepts that justice requires deciding each case upon its merits and that no two contracts are quite the same, but surely we have not labored at the administration of collective agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree even though partisan interests preclude unanimity. Perhaps only a few rules have developed, but I submit that there are attitudes, approaches, and even a number of flexible principles.
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> If we are to develop a rationale of grievance arbitration, more work should be directed towards identifying the standards which shape arbitral opinions; and if the process is rational, as we assert, a partial systematization should be achievable even though scope must be left for art and intuition.[6]

Cox went on to identify some familiar sources of these standards: legal doctrines, a sense of fairness, national labor policy, past practice, and "good industrial practice generally."[7] Twenty-one years later, at the 33rd Annual Meeting, Alex Elson, chair of one of four panels on "Decisional-Thinking," remarked that after 32 years of covering almost every aspect of labor arbitration, it was "not surprising" that the "process of self-examination and group analysis should finally focus on the decision-making process, and in particular on how decisions are reached."[8] The panels, however, focused on the factfinding process, the burden and quantum of

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[4] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

[5] Cox, *Reflections Upon Labor Arbitration in the Light of the* Lincoln Mills *Case*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), 24.

[6] *Id.* at 30, 46.

[7] *Id.* at 46.

[8] Elson, *Decisional Thinking: Chicago Panel Report*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 101.

proof, credibility issues, the use of past practice, the influence of external law particularly concerning duty of fair representation issues, and the arbitrator's role at the hearing.[9]

The panels did at least skirt the edges of the values subject, acknowledging that values exist and do influence decisionmaking. The acknowledgments consisted mainly of quotations from the writings of Supreme Court Justice Benjamin Cardozo and Yale law professor Jerome Frank. Most often quoted were Frank's assertion that the "vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case"[10] and Cardozo's observation that, "Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man [or the woman], whether he [or she] be litigant or judge."[11] (I have my own favorite Cardozo comment: "The decisions of the courts on economic and social questions depend upon their economic and social philosophy; . . . .[12])

At that 33rd Annual Meeting, the West Coast Panel, chaired by Howard Block,[13] stated that trial judges and arbitrators face the same difficulties in their factfinding tasks. The panel cited Professor Frank's conclusion that facts were not found but rather were processed by the trier and that the reactions of trial judges to testimony were "shot through with subjectivity."[14] That panel also found another observation by Cardozo particularly apt in regard to judges' assessments of testimony:

> All their lives, forces which [they] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[15]

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[9]*Id.* at 62–239.

[10]*Id.* at 85 (quoting Frank, Law and the Modern Mind (Anchor 1963), at 104).

[11]*Id.* at 85 (quoting Cardozo, *The Nature of the Judicial Process*, Lecture IV (Yale Univ. Press 1921), at 167).

[12]Cardozo, *supra* note 11, at 171.

[13]Block, *Decisional Thinking: West Coast Panel Report*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 119.

[14]*Id.* at 131 (quoting Frank, Courts on Trial: Myth and Reality in American Justice (Princeton Univ. Press 1949), at 22)).

[15]*Id.* at 122 (quoting Cardozo, *supra* note 12, at 12–13).

Several panelists agreed that our predilections or value judgments have "something to do with how we approach questions," but the discussion went no deeper than that.[16] One conceded that most deciders were unable "to raise to a conscious level the complex reasoning processes that guide our choice."[17] Another, even less optimistic about understanding the influence of values, said that when there were rational bases for deciding a case either way it was "futile to try to generalize about how decisions [were] reached."[18] Still, there was a sense, as one put it, that, "The way you come out in this case depends on how you go in."[19]

Neglect of the Values Subject: Some Misconceptions

That discussion of arbitral decisionmaking occurred 17 annual meetings ago. Except for a paper I presented at the 40th Annual Meeting on "Standards of Behavior for Tenured Teachers: The New York State Experience,"[20] the subject has not been raised before this body again in any systematic way. Why has such an important subject been neglected by this organization of the most distinguished labor arbitrators in the country? As already noted, some think it is an exercise in futility. It may be that this complex subject, to be addressed thoroughly, requires the application of disciplines and methodologies beyond the range of expertise in the Academy. I doubt that, but, to the extent that such is the case, we could invite those doing research in this area to discuss their work with us.

Looking for values and their influence in arbitral decisionmaking, however, is seen sometimes as an exposé that could undermine the integrity of the process and, therefore, needs to be resisted. Arbitrators, like judges, wish to see themselves and the process of justice as coldly objective and impersonal. Consequently, as Cardozo recognized over 75 years ago: "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limita-

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[16]*Decisional Thinking: Chicago Panel Report: Chicago Panel Discussion, id.* at 101, 108; *Decisional Thinking: West Coast Panel Report: West Coast Panel Discussion, id.* at 154, 169.

[17]Block, *supra* note 13, at 124.

[18]Elson, *supra* note 8, at 87.

[19]Valtin, *Decisional Thinking: Washington Panel Report, id.* at 209, 214.

[20]Gross, *Standards of Behavior for Tenured Teachers: The New York State Experience,* in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 181.

tions."[21] This reluctance to investigate and discuss the influence of values in the arbitral decisionmaking process may be reinforced by the fact that most of those who write about labor arbitration are labor arbitrators who might be reluctant to jeopardize their institutional connections or risk offending their fellow arbitrators.

In academe, moreover, the teaching of labor and employment law has become increasingly a-historial and a-philosophical (or a-jurisprudential)—as if cases were decided by automatons in a vacuum. There is the misguided notion that if you know the rule, you know the law. Among the many harmful consequences of this notion is the acceptance and repeated application of longstanding rules without questioning, or knowing, or caring about a rule's origin, or what a rule assumes about the "oughtness" of the power and rights relationship of employer and employee, or whether a rule needs to be reexamined, reevaluated, modified, or rejected.

Neglect may also be the result of the traditional arbitral position that values play no significant role in decisionmaking because the outcome of each case is determined by its unique facts, the intent of the parties, specific contract language, and a consensus that arbitrators do "not sit to dispense [their] own brand of industrial justice."[22] Granted, an arbitrator's latitude for interpretation would vary inversely with the clarity and precision of the contractual language at issue. If there ever were a case where the facts were undisputed and the parties' mutual intent was clear and also undisputed, and the pertinent contractual language was clear and unambiguous, then the decider's values most likely would have little or no significant effect.

But in the real world of labor arbitration, findings of fact must be "drawn from a welter of conflicting testimony;"[23] contractual provisions are unclear and ambiguous, or the agreement is silent concerning the issue in dispute; and mutual intent is disputed or never existed. In addition, as Archibald Cox put it, "many of the most important questions of interpretation in collective bargaining are not soluble by reference to a fundamental purpose of the collective bargaining agreement [because] management and labor often have conflicting objectives, and the interpretation put

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[21]Cardozo, *supra* note 12, at 167–68.

[22]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

[23]Jones, *The Decisional Thinking of Judges and Arbitrators as Triers of Facts*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 45, 51.

upon the contract may depend upon which objective is chosen as the major premise."[24]

These are the typically hard or difficult cases where there is almost always what Sylvester Garrett called "a choice among several potentially applicable sets of principles."[25] The choice involved what Garrett termed the "creative and intuitive nature" of the arbitrator's decisionmaking and required an "independence of mind."[26] In these hard cases, moreover, Garrett found the "pleasing euphemism" that an arbitrator does not "sit to dispense his [or her] own brand of industrial justice" not entirely accurate: "As any experienced practitioner full well knows, an arbitrator (like a judge) brings to each case a set of qualifications and preconceptions based on education, experience, associations, personal qualities, and perhaps instinct, which often may influence the outcome of a case."[27]

In other words, the decider has much more discretion or free play in these cases. Yet, there are limits to the arbitrator's discretionary power. Arbitrators are bound, for example, by the principles of the labor-management system in which they operate, and their decisions must be compatible with at least some of the principles or standards accepted in the labor-management community. This body of common law principles (many established by arbitrators) reduces the element of unpredictability and surprise. There is, however, among these principles wide latitude to choose from, and the choices can vastly narrow or expand an arbitrator's exercise of discretion and thus the influence of values in the decisionmaking process. The choice of either the principle of management reserved rights or the principle of implied limitations is only one of many examples.

What Research Has Demonstrated

My own research has demonstrated that "prevailing ideas about ethics, humanity, law, private property, economics, and the nature

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[24]Cox, *supra* note 5, at 51 (footnote omitted).

[25]Garrett, *Contract Interpretation: I. The Interpretive Process: Myths and Reality*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 121, 145 (quoting Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 102, 122).

[26]*Id.* at 144.

[27]*Id.* at 148.

of the employer-worker relationship not only condition the thinking of [arbitral] decision-makers, but also provide them with the ultimate standards for judgment."[28] These value judgments also preposition a decisionmaker's approach to particular case situations, thereby exerting a powerful influence on the outcomes of those cases.[29]

In those research projects, I intentionally chose subjects and case circumstances that involved conflicting value choices and allowed the decider the most freedom to exercise personal discretion in choosing from among available alternative values and outcomes. The decisions examined in each of these studies, for example, were made in silent contract situations or in disciplinary cases where there was ample room for the decider to apply conceptions of fairness in determining what constitutes just cause, the seriousness of an offense, the credibility of witnesses, standards and burdens of proof, the reasonableness of rules, and the nature of the penalty to be assessed, if any.

One article addressed subcontracting and out-of-unit transfers of work because those cases are exceptionally sensitive to issues of management's rights and job protection.[30] Another focused on workplace health and safety disputes because the fundamental clash between management's rights to operate the enterprise and workers' rights to a safe and healthful workplace was most likely to evoke arbitral value judgments.[31] A third effort, a book, *Teachers on Trial: Values, Standards, and Equity in Judging Conduct and Competence*,[32] examined tripartite panels' decisions giving meaning to the statutory terms "conduct unbecoming a teacher" and "incompetence and inefficiency," none of which was defined in the applicable sections of the New York State Education Law. I will summarize the findings of the first two studies but not the third because I discussed a major portion of the *Teachers on Trial* book at the 40th Annual Meeting.[33]

The study of arbitrators' decisions involving subcontracting and out-of-unit transfers of work identified a dominant value theme:

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[28]Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 Buff. L. Rev. 645 (1985).

[29]*Id.*

[30]Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 Indus. & Lab. Rel. Rev. 55 (1967).

[31]Gross & Greenfield, *supra* note 28.

[32]Gross, Teachers on Trial: Values, Standards and Equity in Judging Conduct and Competence (ILR Press 1988).

[33]Gross, *supra* note 20.

management rights are necessary for the continued existence of the free market system, and the pursuit of efficiency is one of the most important and fundamental rights of management. The reasoning was based on the value judgment that free competition is worth more to society than it costs—a philosophy of progress wherein efficiency is endorsed as socially desirable.[34] The preeminence of efficiency was evidenced in another way—in the distinction between economy and efficiency. Most arbitrators did not endorse subcontracting where a company economizes solely by taking advantage of the lower wage rates paid to employees of an independent contractor. They considered that comparable to a unilateral reduction in a negotiated wage and said employers could not accomplish by indirection what they were prohibited from doing directly. When economy plus efficiency equaled savings, however, there were no reservations.[35] Arbitrator Arthur Ross, in one of his decisions, best summarized the dominance of the management rights value theme:

> Technological change frequently disturbs existing expectations of the employees notwithstanding their seniority and other contractual rights. For better or worse, it is almost unchallenged in the United States that employers should be entitled to take full advantage of science and technology. The established doctrine is that dislocation should be anticipated and dealt with, but should not slow down the progress of technological change itself. Perhaps we have made a mistake in elevating economic progress to the status of an absolute, but this is a philosophical question which need not be answered here. It is sufficient to find that Safeway's computer installation was in line with current business practice and in accordance with prevailing ideology concerning the benefits of unrestricted technological change.[36]

Although the second study examined four categories of cases, only the refusals to work for reasons of safety and health are considered here. The controlling rule in these cases was the principle Harry Shulman established in his 1944 *Ford Motor Co.*[37] decision: work first, grieve later. Shulman did allow for exceptions

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[34]Gross, *supra* note 30, at 60.

[35]*Id.* at 65:

> The reasoning goes this way. If the transferred work is essentially the same work for which the union and the company bilaterally negotiated certain contractual arrangements, management has no unilateral control over that unmodified work. But, if new technologies or methods have altered the work to the extent that it can no longer be identified as that for which the parties contracted, it is no longer bargaining-unit work. The bargaining-unit work has been eliminated, not transferred out of the unit.

Id. at 698.

[36]*Id* at 70–71 (quoting *Safeway Stores*, 42 LA 353, 358, (1964)).

[37]3 LA 779 (1944).

to his rule: for example, when obedience to a management order would require commission of a criminal or otherwise unlawful act or create an "unusual health hazard or other serious sacrifice."[38]

Arbitrators, however, do not literally except health and safety from the work-first, grieve-later rule. Once again, the dominant value theme was that "management's freedom to operate the enterprise and direct the workforce is superior to all other rights including workers' rights to a safe and healthful workplace."[39] Refusals to work, even for reasons of health and safety, were seen as dangerous threats to management authority that, if upheld, could result in "utter chaos" or "anarchy" at the workplace.[40]

This study of health and safety decisions, moreover, revealed more than the presence and influence of values in the decisions. It also demonstrated how the dominant management rights value determined the whole orientation to and processing of these refusal-to-work cases. These cases were treated as insubordination cases. This approach relegated the safety and health claim to that of an affirmative defense to the insubordination charge. Employers were required to establish the usual elements constituting insubordination (i.e., legitimate order, refusal, warning of disciplinary consequences and persistent refusal), whereas employees carried the burden of proving the sufficiency of their reason for refusing the work assignment.[41] The effect of this mode of analysis on the outcome of these cases is even more severe for employees because arbitrators routinely place upon them the heaviest possible standards of proof. Where the standard of proof could be identified (42 percent of the cases), for example, objective proof was required in 66 percent of the cases.[42]

The implementation of this value has other consequences. Although technically the employer carries the burden of proof in all discipline cases, the practical effect of this orientation in refusal to work for reasons of health and safety cases is to shift the burden of proof concerning the decisive issue to the discharged, or otherwise disciplined, employee. For employees, the risk of failing to meet the heavy burden of proof is high, and the consequences potentially disastrous since insubordination of this sort is often considered just cause for discharge. The insubordination mode of

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[38]Gross & Greenfield, *supra* note 28, at 648.
[39]*Id.* at 654–55.
[40]*Id.* at 655.
[41]*Id.* at 648–49.
[42]*Id.* at 650–54.

analysis and the heavy quantum of proof placed on employees, therefore, increases employers' control of employee discipline and minimizes employee interference with management's freedom to operate the enterprise. It also can confront workers with an unfair dilemma—to work and risk their health and safety or to refuse to work and risk their jobs.[43]

Robert Rabin, labor arbitrator and professor of law at Syracuse University, in commenting on this health and safety research[44] as well as Professor James B. Atleson's article on "Obscenities in the Workplace,"[45] asked why "arbitrators accept value judgments that reflect the interest of the dominant power in the work relationship."[46] On the possibility that the obey-first, grieve-later rule "has been around for so long that we have lost sight of its origins," he reread the seminal case as well as a few subsequent case applications of the rule by Shulman. He was "stunned" to find that neither the origins of Shulman's rule nor Shulman's subsequent applications of it were as "inflexible as today's arbitral awards suggest."[47]

Rabin wondered if arbitrators really thought that decisions favoring health and safety will impair efficiency but said he preferred to believe that we have "simply been lulled by habit into intoning phrases."[48] In my opinion, much of this lulled condition can be attributed to the popular and value-laden texts on labor arbitration that present what Charles Killingsworth described as a "'pristine' management reserved-rights theory"[49] to the exclusion of other arbitral interpretations. The study of values would be part of a much-needed reexamination and reassessment of many rules that are being intoned without careful consideration of their past origins or current effects. It would be at the least instructive, for example, to study arbitral decisions (and advocates' positions) over time to see what values predominated then and if those values have changed now, given the changing values in the larger society. Gender issues, minority group issues, and drug and alcoholism issues come immediately to mind.

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[43]*Id.* at 650, 656, 685, 686.

[44]Rabin, *Some Comments on Obscenities, Health and Safety, and Workplace Values*, 34 Buff. L. Rev. 725 (1985).

[45]Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 Buff. L. Rev 693 (1985).

[46]Rabin, *supra* note 44, at 727.

[47]*Id.* at 729.

[48]*Id.* at 731–32.

[49]Garrett, *Contract Interpretation: I. The Interpretative Process: Myths and Reality*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 121, 128.

A Few Concluding Observations

Rabin hoped that his research into safety and health would "make arbitrators, commentators and workers realize the enormous hazards of work, see that risk sharing does not belong solely to the worker, and recognize that self-help advances further the important societal value of keeping workers healthy and alive."[50] It may be, for example, that the right to refuse hazardous work without retaliation is essential for workplace health and safety and that without this basic right workers' lives matter less than management authority, efficiency, productivity, or profit margins. The right to refuse work assignments for reasons of health and safety, for example, is more consistent with the morally superior goal of *preventing* workplace death, injury, and illness than requiring employees to risk injury, illness, or death first and grieve later.

Rabin argued that we "need to develop a model that gives due recognition to individual worth, yet harmonizes individualism with the basic need to get the work done."[51] The prospect of doing that is disturbing and inspiring. It is disturbing because it challenges what has long been accepted as unchallengeable; it is inspiring because, as I noted at the outset, it means we are committed to understanding and constantly improving the arbitral decision-making process that so directly affects people's lives and careers.

There is, understandably, a reluctance to deviate from or ignore a longstanding rule because doing so could jeopardize our acceptability by making us appear to be out of the "mainstream." Arbitrators have survival problems, too, and the prospects of denied recognition or denied daily bread may be the great inhibitors, making it perilous to pioneer new ideas or to venture into unexplored fields. Under those circumstances, advocates would have to be a major source of reexamination and change—proposing new rules or advancing new interpretations and applications of old rules.

But there may be a vicious circle of assumed reactions at work here that prevents change where it is needed. At the same time that arbitrators are sensitive to the intentions and desires of managements and unions, union and management advocates have full knowledge of the approaches that have been successful or unsuc-

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[50]Rabin, *supra* note 44, at 732.
[51]*Id.* at 730.

cessful with arbitrators. Justice Holmes advised lawyers that they would "need to know how judges behave."[52] Should the conclusion be that the arbitrator is simply giving the parties what they want or that the parties are trying to get what they want by conforming to the traditional practices and values of arbitrators? I suggest we stop assuming and get arbitrators and advocates (nonlawyers as well as lawyers) together to talk this out.

Finally, the research that has been done (including my own) on values in the arbitral decisionmaking process has only scratched the surface of what can and needs to be done. So many aspects of who we are and what we do are involved. When I teach my labor arbitration class, for example, I emphasize not only problem analysis and writing skills and knowledge of labor and workplace relations but also compassion and empathy. An effective decider must be able to identify and understand the perspectives, feelings, attitudes, and values of all the parties to a dispute. Many new concerns arise when we read Mario Bognanno's and Clifford Smith's 1988 report on the demographics and professional characteristics of U.S. labor arbitrators and labor advocates[53] together with Bruce Fraser's 1991 paper on the new diversity in the workplace[54] and Lamont Stallworth's and Martin Malin's 1993 paper on conflicts arising out of workplace diversity.[55] Because of substantially different values, experiences, backgrounds, and perspectives, arbitrators as deciders might be blinded to the ways in which they privilege some voices (often the voices of people like them) and stifle others (often people not like them) when listening to testimony, processing the facts, and making judgments.

Member George Fleischli,[56] in his comment on the demographics report, perceptively and delicately looked at the same question from the perspective of the increasingly diverse work force:

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[52]White, Social Thought in America (Beacon Press 1947), 208.

[53]Bognanno & Smith, *The Arbitration Profession: I. The Demographic and Professional Characteristics of Arbitrators in North America*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 266.

[54]Fraser, *A New Diversity in the Workplace—the Challenge to Arbitration: Part I. The U.S. Experience*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 143.

[55]Stallworth & Malin, *Conflicts Arising Out of Work Force Diversity*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 104.

[56]Fleischli, *The Arbitration Profession: Comment*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 302.

> [T]he long-term viability of arbitration may depend on the perception of those upon whom it has the greatest personal impact.... In collective bargaining relations, perceptions are frequently more important than reality, and the perception of these female and minority employees is understandably skeptical of the fairness of a system which is dominated by advocates and arbitrators who are seldom female or minority.[57]

A paper such as this should end by tying it all together rather than raising new questions. But there is far more to be done than has been done so far. As I pointed out at the beginning, however, learning more about arbitral decisionmaking, including the influence of values, will strengthen, not weaken, the arbitration process.

II. ARBITRATION: THE PRESENCE OF VALUES IN A RATIONAL DECISIONMAKING SYSTEM

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Recently, there has been a significant number of proposals for revising the National Labor Relations Act (NLRA), and the reasons for such efforts are obvious. Those who propose statutory changes assume, as they must, that the values or goals of such enactments will not be subverted by a hostile or indifferent judiciary or National Labor Relations Board. Yet, in this area where feelings are strong and deep-seated, all issues are contentious. Moreover, as the volume of academic scholarship demonstrates, the labor law field is littered with judicial decisions that seem inconsistent with the language, purposes, and legislative history of the NLRA.

The issue is more complex than inherent bias, for there are real differences of opinion affecting every conceivable question in the field. Apart from economic or social bias or differences of value, people bring different assumptions to each issue. Each decisionmaker looks at the situation through the lens of his or her own experience, one that refracts light in different ways. By focusing upon values, therefore, I am not referring to biases but to underlying principles and guidelines that help direct us to decisions.

Many scholars have recognized that certain labor law decisions do not seem to be consistent with the principles of statutory interpretation, that is, some rulings are seemingly not based upon

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[57] *Id.* at 304.

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the statutory language, the legislative history, or the statute's professed goals. In *Values and Assumptions in American Law,*[1] I noted that the seeming incoherence of much of American labor law could be explained by a quite coherent set of judicially held values that resonated from or paralleled those expressed in 19th century opinions. I was consciously trying to respond to the then-fashionable notion that labor law was simply incomprehensible or, at least, contradictory. The American decisions did make some sense, I believed, although they were not consistent with the ways lawyers had been trained to think about legal issues. I believe these values included the following:

1. Continuity of production must be maintained, limited only when statutory language clearly protects employee interference.
2. Employees, unless controlled, will act irresponsibly.
3. Employees possess only limited status in the workplace, and, correspondingly, they owe a substantial measure of respect and deference to their employers.
4. The enterprise is under management's control, and great stress is placed upon the employer's property rights in directing the workplace.
5. Despite the participatory goals of the NLRA, employees cannot be full partners in the enterprise because such an arrangement would interfere with inherent and exclusive managerial rights.

Do arbitrators possess the same kinds of values? First, do arbitrators have values at all that affect the results they reach? This seems like an odd question to me, but to raise the issue is often to draw the ire of colleagues and others who just happen to be arbitrators. Some years ago, I read a randomly chosen group of arbitration decisions dealing with the imposition of discipline when workers swore at supervisors, and it was published with the much more substantial article by Jim Gross and Pat Greenfield[2] on implicit

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[1]Atleson, Values and Assumptions in American Labor Law (Univ. of Mass. Press 1983). The conclusions reached were presaged many years ago by Oliver Wendell Holmes, then on the Massachusetts bench: "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." *Vegelahn v. Guntner,* 167 Mass. 92, 44 N.E. 1077 (1896).

[2]Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights,* 34 Buff. L. Rev. 645 (1985).

arbitral values in cases involving safety and health.[3] One common response from arbitrators was to note how difficult it often was to reach a satisfactory decision and that values were never allowed to affect their decisions. Late at night, struggling with a seemingly intractable problem, many of us draw sustenance from Justice Douglas' comment in *Steelworkers v. Warrior & Gulf Navigation Co.*[4] that "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[5] I certainly am not suggesting that arbitrators do not try responsibly to reach the wisest result, one consistent with the agreement, but, rather, I am suggesting that arbitrators examine their values and assumptions that create boundaries to their thinking, or that make certain routes or directions, rather than others, seem "right."

We all have had the experience, I assume, of writing an award both ways, finding eventually that one seems "right," even though we may have felt more sympathetic to the side that will now lose. Such an experience convinces us of our objectivity—and I certainly do not want to deny or denigrate such an experience. If the "neutrality" of arbitrators refers to their lack of bias toward a particular outcome in a case, then the characterization of our objectivity may well be correct. If, on the other hand, the designation "neutral" implies the absence of a set of assumptions about the nature of the enterprise and the role or station of employees, then the statement seems clearly wrong.

The question is, why do certain results seem "right" and certain assumptions seem more appropriate than others? There are often two (or more) paths in the woods, and we tend to lead our horse in one direction rather than the other. I suggest that what often leads us in a certain direction are certain ideas or notions about the nature and requirements of the workplace. I do not hesitate to say that, unlike some courts, arbitrators are not opposed to unions, collective bargaining, or even collective action, at least if it is not inconsistent with the terms of the agreement.

Nevertheless, it seems clear to me that a set of values does, in fact, exist, and they often parallel those I have found present in Board and court opinions. (Perhaps "values" is too abstract a term to use,

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[3]Atleson, *Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships*, 34 Buff. L. Rev. 693 (1985).

[4]363 U.S. 574, 46 LRRM 2416 (1960).

[5]*Id.* at 582.

and "implicit guidelines" may be easier to employ.) Jim Gross and Pat Greenfield's article[6] on safety and health issues, for instance, clearly demonstrated that arbitrators do have values that apply across cases, and often are memorialized in books like that of the Elkouris,[7] to be used again and again. This is not to say that all arbitrators agree, for there are many areas in which differences can be found.

Moreover, I found that many arbitrators believed that disorder would occur and production would be diminished if workers were permitted to swear at their supervisors. Arbitrators assumed, as one said, that "the right of management to run its business presumes respect on the part of employees for their supervisors. Profanity, epithets, and verbal abuse interfere with the kind of continuous control which management must have over its workforce."[8] Repeatedly, "respect" for one's superiors was thought to be necessary, and swearing was seen as a "direct challenge" to supervision. No evidence of adverse production effects was usually required. Moreover, the fact that workers often perceived that a disorderly and chaotic situation existed and were reacting to such a perception, or the fact that swearing is often the response of weaker parties, was simply ignored.

"Shop talk," that is, the kind of language often found in the workplace, was typically distinguished from the language that permissibly could be used when speaking to supervisors. Arbitrators generally protected the symbolic status of management and the hierarchical relations in the workplace. In short, arbitrators rather uncritically accepted hierarchical notions of order and control in what is usually championed as a joint, contractual endeavor.

There are many other areas that could be selected for review. For instance, the area of managerial prerogatives provides a rich "mother lode." In cases where the contract is silent on the subject of subcontracting, to take one common problem, some arbitrators seem to view their role as upholders of economic efficiency, often as defined by the employer. Although implied limitations are sometimes found, many arbitrators begin with what I call the "Genesis" theory of managerial power. That is, "in the beginning,"

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[6] *Supra* note 2.

[7] Volz & Goggin, eds., Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997).

[8] Stessin, Employee Discipline (BNA Books 1960), 59.

management directed the enterprise until limited by law and collective agreements. Employers, however, *still* possessed all power that has not been expressly, or perhaps implicitly, restricted by agreement. This approach treats the collective agreement as if it were a state constitution, granting the state all the power except for limitations in the constitution, rather than viewing the agreement as if it were more like the federal Constitution, granting only those powers explicitly or implicitly specified. This notion, like those embedded in the swearing cases, assumes that certain rights are necessarily vested in management or are based upon an economic value judgment about the necessary locus of power in the workplace.

A third area that could be considered is the notion that employees cannot refuse to carry out work orders, even though they feel that the orders violate the agreement or past practice. Such action is deemed "self-help," and it is not permissible, even though we could clearly envision a system where the *propriety of the worker's refusal* would be tested in a subsequent arbitration proceeding. The famous Shulman opinion, usually given as the source of the "obey now, grieve later" rule, was created during World War II. It is interesting to note that the notion of an exclusive zone of managerial prerogatives was established by the War Labor Board, not the National Labor Relations Board.[9] To the War Labor Board, however, the "obey now, grieve later" rule was not so much designed to avoid the possibility that employees will otherwise engage in self-help or because it was a necessary requirement of the grievance process, as would be argued after the war. Instead, the rule was based upon the War Labor Board's assumption that such a concept was an incident of managerial prerogative, protecting hierarchy and aiding continued production. Interestingly, Robert Rabin found that Shulman's strong position asserted during wartime was not reflected in his postwar decisions.[10] In any event, the result is that something akin to a constitutional monarchy exists rather than a participatory democracy.

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[9]Opinions of the Umpire, Opinion A-116 (1944), also published as *Ford Motor Co.*, 3 LA 779 (Shulman 1944). *See also* Atleson, Labor and the Wartime State: Law and Labor Regulation During World War II (Univ. of Ill. Press, forthcoming, 1997); Atleson, *Wartime Labor Regulation, the Industrial Pluralists, and the Law of Collective Bargaining*, in Industrial Democracy in America: The Ambiguous Promise, eds. Lichtenstein & Harris (Cambridge Univ. Press 1993), 178.

[10]Rabin, *Some Comments on Obscenities, Health and Safety, and Workplace Values*, 34 Buff. L. Rev. 725, 729 (1985).

Finally, a recent group of arbitration cases confronted me with the problem of the employee who allegedly engaged in misconduct or criminal activity outside the workplace. The normal approach is to recognize the worker's private life and restrict the employer's power to discipline for nonworkplace activity, unless there is a connection to the workplace. My reading of many awards suggests that the exception has in many cases come close to swallowing up the rule. Obviously, a drug bust of a teacher or even of a maintenance person at a school—to refer to some of my recent cases—has some effect upon the school and may have some effect upon the work performance of the individual involved. However, it seems that many decisions do not balance that effect against the interest in job security recognized in the just-cause clause itself. Instead, many decisions—either due to concern for the employer's reputation or reaction to criminal conduct—seem to stop after finding that the worker's off-duty activity had some effect upon the employer.

It would be foolish to argue that values should play no part in decisionmaking. Indeed, I cannot imagine such a system. How, for instance, would we decide any of the above issues without relying upon some set of assumptions about the meaning of the contractual regime or the needs of the workplace? Moreover, I do not argue that any of the assumptions mentioned earlier are "wrong" in some sense, but only that decisions often require a value choice.

Legal decisionmakers have a variety of ways to disguise the use of values, or they often use sentences that begin "of course . . . ." Arbitrators, on the other hand, usually are clearer and more honest about the values and assumptions they employ. Yet, many arbitrators will vigorously deny that such value judgments are in fact made. Cynics, indeed some of my students, might say that we have a strong interest in making certain that such a perception is not created. But the representatives of labor and management already know which of us is more or less sympathetic to the protection of implicit managerial prerogatives or to discharged employees, and how we have ruled in the past on the myriad of issues that have confronted us. We are, I think, often trying too hard to deny what is, after all, open for all to see in our awards.

Finally, I wish to concede some real limitations upon us. The decisions of past arbitrators, the "great ones," may give us little room to maneuver effectively, even if we desired some flexibility. After all, it is rational to consider the decisions of earlier arbitrators to be part of the context in which collective agreements are

negotiated. Treatises provide the same limitations, although, as I found in examining swearing cases, the treatise writers often have axes—or values—of their own to grind.

My concern is modest indeed. I ask only that we try critically to evaluate the values, assumptions, or guidelines that we in fact use when we strive to reach the "right" result. It is important to be aware of how our training, or reading of other awards or even treatises, guides us in certain directions and obscures alternative avenues.

Comment

RICHARD MITTENTHAL*

Jim Gross and Jim Atleson have each provided a thoughtful and compelling picture of the influence of value judgments on an arbitrator's work. I shall use my brief time to offer some illustrations as to how this process functions.

The issues before us are rarely neat or perfectly structured. The testimony is contradictory; the facts are in dispute; the contract language is ambiguous; and the equitable considerations, to the extent to which they can be divined, pull in different directions. Given these difficulties, it is hardly surprising that the arbitrator's sense of justice in the case at hand may prove to be a decisive factor. And a sense of justice is, I believe, often rooted in value judgments. Indeed, I would suggest to you that value judgments are a form of equity or are at least the engine that drives an arbitrator toward a particular equity finding.

This subject can be effectively discussed and understood only through a number of examples. The most obvious one can be seen in the typical discharge case. There, one of the issues before the arbitrator is whether discharge, assuming the employee's guilt, is a reasonable penalty under all the circumstances of the case. That inquiry calls for consideration of the seriousness of the offense. Over the course of time, changes occur in how we view certain misconduct. For instance, in the 1950s, sleeping on the job was often held to justify discharge for a first offense, while sexual harassment may have warranted no more than a brief suspension, perhaps a mere written reprimand. In 1997, the first time an employee is caught sleeping on the job will prompt no more than a brief suspension, while sexual harassment will be held to warrant

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discharge. How things have changed. Widespread inattention to duty in the workplace seems to have downgraded the seriousness of a first sleeping offense. And widespread revulsion against the abuse of women has transformed harassment into a "capital" offense. Thus, a change in societal or workplace values alters arbitral value judgments, which in turn affect our view of what is a reasonable penalty.

In contract interpretation as well, value judgments have a substantial role to play. Consider the following elaborate example. Bear with me. Assume that large coils of steel in a basic steel plant have customarily been moved by rail within the plant, that such rail transport has always been handled by bargaining unit employees, that management decides to replace rail transport with tractors, that legitimate cost considerations induce management to lease the tractors from a contractor, that the contractor insists the tractors be operated by its people rather than bargaining unit employees, and that management agrees to these arrangements. Assume further that the union grieves and the resultant dispute turns solely on the question of whether the contractor is performing "bargaining unit work."

The problem is, what exactly did the parties mean by the term "bargaining unit work"? These words are elastic in the extreme and are rarely, if ever, defined in the agreement. If "bargaining unit work" is defined *broadly* from the standpoint of function alone, the decision will favor the union. Such a definition would mean that the transportation of steel, whatever the means, belongs to the bargaining unit. If, on the other hand, "bargaining unit work" is defined *narrowly* from the standpoint not just of function but also the means by which the function is performed or the area in which the function is performed, the decision will favor management. Such a definition would guarantee the "bargaining unit" only the work involved in transporting steel by rail. It would not cover transporting steel by tractor.

There is something to be said for each of these definitions. Which makes more sense? Ultimately, the answer lies in the arbitrator's value judgment. The competing values should be apparent. Management will emphasize *flexibility*, the freedom to choose the most efficient method of utilizing its limited resources to perform a given task. Its argument stresses that this kind of tractor had never before been used in the plant, that the contractor would lease the tractors only on the condition that its people would operate them, that the capital investment for purchasing the

tractors was too large, and so on. The union will emphasize *stability*, the need to recognize that the bargaining unit had always encompassed the transportation of coils. Its argument stresses that the bargaining unit concerns functions rather than equipment, that transportation is a service function intimately related to the production of steel, that the nature of the task is more important than how the task is performed.

Arbitrators recognize that each of these competing values is entitled to fair consideration in each case. We cannot say that flexibility should always receive more weight than stability, or vice versa. Absent any guidance in the agreement, we define the term "bargaining unit work" broadly or narrowly, depending on which definition will produce what we believe to be the more sensible decision. Our choice, I suspect, will be influenced by such factors as the impact of the use of a contractor on the bargaining unit, the strength of management's explanation for contracting out, the practicality of the different outcomes, and so on. These factors together demand that the arbitrator make a value judgment. Other contractual ambiguities, for instance, the meaning of the term "job," sometimes call for this same kind of value analysis.

Mr. Justice Douglas, in speaking for the Supreme Court in *Steelworkers v. Warrior & Gulf Navigation Co.*,[1] asserted:

> The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.[2]

These words were viewed by most observers as an unrealistic statement of how arbitrators decide cases. They seem, at first blush, to clothe arbitrators with an extraordinary amount of discretion, far more than we are comfortable with. However, if Douglas' comments are read in relation to those cases where value judgments become necessary in resolving an ambiguity, then his comments hardly seem surprising, for he is suggesting precisely the kind of value analysis that is often unavoidable in dealing with the

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[1]363 U.S. 574, 46 LRRM 2416 (1960).
[2]*Id.* at 582.

ambiguity inherent in such terms as "work" and "job." Equity is surely a legitimate device in wending one's way through such a problem. And, to repeat, value judgments are a form of equity. Indeed, this same value analysis is involved in the difficult question of what implications, if any, can reasonably be drawn from a collective bargaining agreement that is silent on the specific subject matter dealt with in the grievance.

Notwithstanding what I have already said, the fact is that arbitral opinions rarely refer to any such value analysis. That does not mean value judgments have not played a role in the decision. It means only that arbitrators, aware of the need for acceptability, have avoided any mention of values. The decision will rely on the "unique circumstances of the case," perhaps some contractual principle, and then move on to a conclusion. To base a decision, for instance, on values such as stability or flexibility or employee morale or productivity is to risk the appearance of siding with one party or the other on some matter of fundamental concern. That is not always a comfortable stance for arbitrators. The simpler course is to avoid any reference to values and embrace a practical result because it is "consistent with the record as a whole," or will "effectuate the basic purposes of the agreement," or some such rubric. Just as the parties fail to provide the arbitrator with all of the facts, the arbitrator sometimes fails to provide the parties with all of the reasons for the award. Such self-restraint is a legitimate self-protective device. Value judgments, nevertheless, regardless of what the award says, will inevitably influence our rulings in the close cases.

This Academy is always seeking new subjects of study or perhaps new ways of looking at old subjects. The anatomy of value judgments in arbitration should provide us with such an opportunity. We ought to know more about how and when a particular value judgment can be useful in resolving a dispute. The identification of the values in question is the necessary first step. The complex business of applying values in a given case, of determining the impact of values on the decisional process, is a worthy goal. This may sound a trifle high-blown, but it really involves an effort to better understand an aspect of decisionmaking that still remains largely in the dark.